

Competing Preferent Community Prospecting Rights: A Nonchalant Custodian?

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Abstract

Traditional communities that were precluded from the benefits and financial rewards of exploitation of the mineral resources of South Africa are afforded the opportunity to lodge an application with the Department of Mineral Resources (hereafter the department) to obtain a so-called preferent prospecting right (or mining right) in respect of land which is registered - or to be registered - in their name. An applicant on behalf of the community has to meet the requirements of section 104(2) of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter the *MPRDA*). This in line with one of the objectives of the *MPRDA* of expanding the opportunities for historically disadvantaged persons, such as traditional communities, to enter into, and actively participate in, the mineral industry and to benefit from the exploitation of the nation's mineral resources (s 2(d)). The Minister of Mineral Resources ((hereafter the minister), in his/her capacity as the custodian of the mineral resources of South Africa on behalf of the people of South Africa (s 3(1)), is, amongst others, by implication tasked with achieving, these objectives. The same applies to the department and its officials. However, this was unfortunately not the experience of a traditional community, the Bengwenyama-Ya-Maswazi community (hereafter the BYM community), who had to battle through two rounds of litigation with the minister, the department and persons and entities which promoted their own interests whilst attempting to convey the (false) impression that they were representing the community.

The subject of this discussion is the second round of litigation between the Bengwenyama-Ya-Maswazi Tribal Council and Genorah. The second round of litigation involved competing applications for preferent community prospecting rights in two related appeals heard together by the Supreme Court of Appeal (hereafter the SCA). The first appeal concerned preferent community prospecting rights on the farm Nooitverwacht (hereafter the Nooitverwacht appeal) and the second appeal involved preferent community prospecting rights on the farm Eerstegeluk (hereafter the Eerstegeluk appeal). The focus of the discussion is on the Nooitverwacht appeal, and references (where appropriate) will be made to the Eerstegeluk appeal. A number of related issues are also discussed – these include the distinction between prospecting rights and preferent community prospecting rights; the meaning of "... land which is registered or to be registered in the name of the community concerned" (with reference to restitution land, redistribution land, and community land acquired from own resources); and the changing legal landscape relating to community decision-making and consultation.

Keywords

Mineral resources; prospecting rights; traditional communities.

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These are the days of miracle and wonder.¹

1 Introduction

Traditional communities that were precluded from the benefits and financial rewards of exploitation of the mineral resources of South Africa are afforded the opportunity to lodge an application with the Department of Mineral Resources (hereafter the Department) to obtain a so-called preferent prospecting right (or mining right) in respect of land which is registered - or to be registered - in their name.² An applicant on behalf of the community has to meet the requirements of section 104(2) of the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the MPRDA). This is in line with one of the objectives of the MPRDA of expanding the opportunities for historically disadvantaged persons, such as traditional communities, to enter into and actively participate in the mineral industry and to benefit from the exploitation of the nation's mineral resources (section 2(d)). The Minister of Mineral Resources (hereafter the Minister), in his/her capacity as the custodian of the mineral resources of South Africa on behalf of the people of South Africa (section 3(1)), is by implication tasked with achieving these objectives, amongst others. The same applies to the Department and its officials. However, this was unfortunately not the experience of a traditional community, the Bengwenyama-Ya-Maswazi community (hereafter the BYM community), who had to battle through two rounds of litigation with the Minister, the Department, and persons and entities which promoted their own interests whilst attempting to convey the (false) impression that they were representing the community.

The first round of litigation in essence involved a competition between an application for a regular prospecting right (in terms of section 17 of the MPRDA) and an application for a preferent community prospecting right (in terms of section 104 of the MPRDA) by the BYM community (as defined in section 1 of the MPRDA) in respect of land occupied by the

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¹ Paul Simon from the song *Boy in the Bubble*.

² Section 104(1) of the *Mineral and Petroleum Resources Development Act 28 of 2002*.

BYM community. It culminated in the judgment of the Constitutional Court (hereafter the CC) in *Bengwenyama Minerals v Genorah Resources (Pty) Ltd* 2011 40 SA 113 (CC) (hereafter *Bengwenyama*) in which prospecting rights granted in terms of the MPRDA by the Department in favour of Genorah Resources (Pty) Ltd (hereafter Genorah) in respect of the farms Nooitverwacht and Eerstegeluk, in the Limpopo Province, were set aside. The CC decision was based on (a) the lack of consultation by Genorah with the BYM community and (b) the failure of the Minister to provide Bengwenyama Minerals (Pty) Ltd, as representative of the community, with an opportunity to apply on behalf of the community (as a traditional community) for a preferent (community) prospecting right in terms of section 104 of the MPRDA.³

The subject of this discussion is the second round of litigation between the Bengwenyama-Ya-Maswazi Tribal Council and Genorah. The second round of litigation involved competing applications for preferent community prospecting rights in two related appeals heard together by the Supreme Court of Appeal (hereafter the SCA).⁴ The first appeal⁵ concerned preferent community prospecting rights on the farm Nooitverwacht (hereafter the Nooitverwacht appeal) and the second appeal⁶ involved preferent community prospecting rights on the farm Eerstegeluk (hereafter the Eerstegeluk appeal). The focus of the discussion is on the Nooitverwacht appeal, and references (where appropriate) will be made to the Eerstegeluk appeal. A number of related issues are also discussed – these include the distinction between prospecting rights and preferent community prospecting rights; the meaning of "land which is registered or to be registered in the name of the community concerned" (with reference to restitution land, redistribution land, and community land acquired from own resources); and the changing legal landscape relating to community decision-making and consultation.

³ *Bengwenyama-Ya-Maswazi Community v Minister for Mineral Resources* 2015 1 SA 197 (SCA) para 2. For a discussion of the first round of *Bengwenyama* litigation in the different courts see Badenhorst and Olivier 2011 *De Jure* 126; Badenhorst, Olivier and Williams 2012 *TSAR* 106; Humby 2012 *PELJ* 166.

⁴ *Bengwenyama-Ya-Maswazi Community v Minister for Mineral Resources* 2015 1 SA 197 (SCA) para 1.

⁵ *Bengwenyama-Ya-Maswazi Community v Minister for Mineral Resources* 2015 1 SA 197 (SCA) (hereafter the Nooitverwacht appeal).

⁶ *Bengwenyama-Ya-Maswazi Community v Genorah Resources (Pty) Ltd* 2015 1 SA 219 (SCA) (hereafter the Eerstegeluk appeal).

2 Parties, background facts and history of the cases

2.1 *The parties to the dispute in the SCA*

The appellants in the Nooitverwacht appeal were as follows:

- First appellant: The BYM community;
- Second appellant: Bengwenyama-Ya-Maswazi Tribal Council (hereafter the tribal council); and
- Third appellant: Miracle Upon Miracle Investments (Pty) Ltd (hereafter MUM) (as the corporate vehicle of the tribal council).

The respondents in the Nooitverwacht appeal were as follows:

- First respondent: The Minister;
- Second and third respondent: The alleged representatives of the BYM community (S Nkosi and NS Nkosi: the so-called "imposters");
- Fourth respondents: Genorah.

The appellants in the Eerstegeluk appeal were as follows:

- First appellant: The BYM community;
- Second appellant: The tribal council; and
- Third appellant: MUM.

The respondents in the Eerstegeluk appeal were as follows:

- First respondent: Genorah (as the corporate vehicle of the Roka Phasha Phokwane Tribal Council);
- Second respondent: The Roka Phasha Phokwane Tribal Council;
- Third respondent: The Roka Phasha Phokwane community; and
- Fourth respondents: The Minister.

In both the Nooitverwacht and Eerstegeluk appeals the SCA used the terms "tribal council" and "traditional council" interchangeably. Although section 28(4) of the *Traditional Leadership and Governance Framework Act* 41 of 2003⁷ provided that all previously existing tribal authorities are deemed to be traditional councils as from the commencement date, the SCA used both terms ("tribal council" and "traditional council") to refer also to the post-24 September 2004 status and role of those institutions. For the purposes of uniformity, the term "tribal council" is used throughout this

⁷ Commencement date 24 September 2004.

piece, with the only exception being direct quotations from the judgements and where the *Traditional Leadership and Governance Framework Act* 41 of 2003 and the accompanying *Limpopo Traditional Leadership and Institutions Act* 6 of 2005 (commencement date 1 April 2006) are discussed.

2.2 The applications by the BYM community and individuals in respect of the farm Nooitverwacht

Nooitverwacht was registered in the name of the state.⁸ At the instance of the tribal council, an application for an exclusive preferent community prospecting right was prepared and submitted in respect of the farm Nooitverwacht by the BYM community using a corporate vehicle, namely MUM.⁹ The application was submitted to the Department in the name of MUM in accordance with the MPRDA on the same day that, and immediately after, the CC handed down its judgement in the first round of litigation.¹⁰ The BYM community was the majority shareholder in MUM.¹¹ MUM fortuitously became aware of the existence of a competing application for preferent community prospecting rights in relation to Nooitverwacht, which application had been submitted, allegedly on behalf of the "BYM community", by two individuals, Dr and Mr Nkosi - the so-called "imposters" (in the words of the SCA).¹² The imposters, with the full knowledge of Genorah, purported to represent the Bengwenyama-Ya-Maswazi Royal Council (hereafter the royal council) as well as the tribal council.¹³

The Minister chose to award the "BYM community" a 50% share in the preferent community prospecting right with the other 50% going to MUM.¹⁴ The Department, however, granted a preferent community prospecting right to the BYM community,¹⁵ but made it subject to an agreement dated 20 December 2011 in terms of which Genorah would play a major role.¹⁶ Due to its long, troubled, antagonistic relationship with and litigation

⁸ Eerstegeluk appeal para 17.

⁹ Eerstegeluk appeal paras 3, 8.

¹⁰ Nooitverwacht appeal para 3.

¹¹ Nooitverwacht appeal para 8.

¹² Nooitverwacht appeal para 4; Eerstegeluk appeal para 10.

¹³ Nooitverwacht appeal para 4.

¹⁴ Nooitverwacht appeal para 4.

¹⁵ Eerstegeluk appeal para 14.

¹⁶ Nooitverwacht appeal para 4.

against Genorah, the BYM community did not want to be involved in a relationship with Genorah.¹⁷

2.3 Two applications in respect of Eerstegeluk

The farm Eerstegeluk was registered in the name of the State.¹⁸ Eerstegeluk was subject to a land claim which had been lodged before December 1998 in accordance with the provisions of the *Restitution of Land Rights Act* 22 of 1994 by the BYM community.¹⁹

The overwhelming majority of the inhabitants of Eerstegeluk are members of the BYM community and regard the tribal council as their traditional authority.²⁰ Another community, the Roka Phasha Phokwane community, is confined to a strip of land on Eerstegeluk and constitutes a very small minority on the farm in percentage terms.²¹ The Roka Phasha Phokwane community did not lodge a competing land claim for the restoration of Eerstegeluk.²²

The BYM community, at the instance of the tribal council, and represented by MUM, submitted an application for a preferent community prospecting right in respect of Eerstegeluk.²³ However, the Roka Phasha Phokwane community, in joint venture with Genorah, also applied for a preferent community prospecting right in respect of Eerstegeluk.²⁴

The Minister refused MUM's application for a preferent community prospecting right on the basis that the BYM community was neither the registered owner nor the occupier of Eerstegeluk.²⁵ Nevertheless, despite the fact that the Roka Phasha Phokwane community was also not the registered owner of Eerstegeluk, a preferent community prospecting right over the said land was granted to the Roka Phasha Phokwane tribal council in a joint venture with Genorah.²⁶

¹⁷ See Nooitverwacht appeal para 5; Eerstegeluk appeal para 14.

¹⁸ Eerstegeluk appeal para 17.

¹⁹ Eerstegeluk appeal para 21.

²⁰ Eerstegeluk appeal para 20.

²¹ Eerstegeluk appeal para 20.

²² Eerstegeluk appeal para 22.

²³ Eerstegeluk appeal para 8.

²⁴ Eerstegeluk appeal para 10.

²⁵ Eerstegeluk appeal para 13.

²⁶ Eerstegeluk appeal para 15.

2.4 Representations by the tribal council and MUM (Nooitverwacht)

After the Department had issued the preferent community prospecting right to the BYM community (subject, however, to the 20 December 2011 agreement, which allocated a major role to Genorah), the tribal council and MUM unsuccessfully requested the Department to grant them the exclusive preferent community prospecting right.²⁷

2.5 Decision of the court a quo as regards Nooitverwacht

2.5.1 Orders applied for by appellants

The appellants applied in the North Gauteng High Court (hereafter the High Court) for a number of orders:

- (a) a declaration that the tribal council was the only authorised representative of the BYM community as regards its communication with both the Minister and the Department;
- (b) preventing the imposters from persisting in fraudulently creating the impression that they were the legitimate representatives of the BYM community;
- (c) directing the Department that it should deal with the BYM community and the representatives identified by it;²⁸
- (d) the award of an exclusive and undivided preferent community prospecting right in respect of Nooitverwacht to MUM;
- (e) the setting aside of the preferent community prospecting right as issued by the Department; and
- (f) [i]n essence, what was sought was an order reviewing and setting aside the decision of the Minister to award the Nooitverwacht [preferent community] prospecting rights jointly to the [BYM community] and MUM or to "the Community" and substituting that decision with a decision to award the sole [preferent community] prospecting rights over Nooitverwacht to MUM.²⁹

²⁷ Nooitverwacht appeal para 6.

²⁸ Nooitverwacht appeal para 6.

²⁹ Nooitverwacht appeal para 7.

2.5.2 *Appellants' case*

The appellants' case in the High Court was firstly that the section 104 application in respect of both Nooitverwacht and Eerstegeluk was submitted by MUM, with the BYM community being the majority shareholder.³⁰ Secondly, they averred that both the royal council and the tribal council had resolved that MUM should be the vehicle for the application.³¹ Thirdly, an extensive BYM community consultation process was executed by the tribal council.³² Fourthly, examples of the fraudulent behaviour by both the imposters and Genorah were provided (indicating, amongst other things, that their application was supported by the tribal council).³³ Fifthly, the Defendants' application "was a blatant attempt to circumvent the [CC] judgment".³⁴ Sixthly, the appellants averred that there was an improper relationship between the respondents and the Department.³⁵ Seventhly it was alleged that there had been no consultation with the recognised Bengwenyama-Ya-Maswazi leadership structures and only cursory and negligible consultation with the BYM community.³⁶ In the eighth instance, the Minister's and the Department's treatment of the BYM community continued, notwithstanding the CC decision.³⁷

2.5.3 *Respondents' case (Nooitverwacht)*

The respondents averred that the BYM community did not have any existence or capacity in law (this was conceded by the second and third appellants, probably on account of the BYM community's being an "amorphous entity"). Secondly, they denied that the tribal council was a legal person (and claimed that it thus did not have any *locus standi*). Thirdly, the nature and extent of the tribal council's authority to be the sole determiner of the BYM community's matters were questioned. Fourthly, MUM's standing to be awarded a section 104 preferent community prospecting right was questioned. Fifthly, the substituted order as applied for by the applicants was not competent. Lastly, the tribal council and

³⁰ Nooitverwacht appeal para 8.

³¹ Nooitverwacht appeal para 9.

³² Nooitverwacht appeal para 10.

³³ Nooitverwacht appeal paras 11-18.

³⁴ Nooitverwacht appeal para 19.

³⁵ Nooitverwacht appeal para 20.

³⁶ Nooitverwacht appeal para 21.

³⁷ Nooitverwacht appeal paras 22-23.

MUM had not provided a sustainable basis for the setting aside of the award.³⁸

2.5.4 Counter application lodged by Genorah (*Nooitverwacht*)

Genorah also lodged a counter application for an order declaring that (a) MUM was not a community as defined in sections 1 and 104 of the MPRDA, (b) the award of a section 104 preferent community prospecting right to MUM Was *ultra vires*, and (c) the Minister's decision to grant the preferent community prospecting right jointly to Genorah and MUM should be set aside.³⁹

2.5.5 Decision by the High Court (*Nooitverwacht*)

The High Court did not make a pronouncement as regards the legal status of the tribal council. It concluded that the tribal council and MUM "had failed to establish that the latter was the sole representative of the BYM community in matters concerning the award of [preferent community] prospecting rights on the farm".⁴⁰ After analysing the preliminary issues mentioned in sections 104(2)(a)-(c) of the MPRDA, the High Court concluded that the Minister's award of the preferent community prospecting right to Genorah and MUM jointly was in order.⁴¹ As regards the tribal council's averments about one of the imposters (Dr Nkosi), the court found that, notwithstanding the absence of having the mandate of the tribal council, he had proved that "a sizable number of [BYM] community members entrusted him with that mandate".⁴² The court also "noted that it was regrettable that the Minister took no part" in the High Court case; however, it confirmed the Minister's award, with specific reference to the fact that there were divisions within the BYM community.⁴³ As regards the role of corporate entities (Genorah and MUM), the court was of the opinion that BYM community shareholding was an essential requirement. As a consequence, the application was dismissed. Due to a lack of merit, Genorah's counter application was also dismissed; within this context, the High Court referred to the *Bengwenyama CC* case, which

³⁸ Nooitverwacht appeal para 24.

³⁹ Nooitverwacht appeal para 25.

⁴⁰ Nooitverwacht appeal para 26.

⁴¹ Nooitverwacht appeal para 27.

⁴² Nooitverwacht appeal para 28.

⁴³ Nooitverwacht appeal para 29.

"had recognised the right of the [BYM] community to pursue its own application through the use of a corporate vehicle".⁴⁴

2.6 Decision of the court a quo as regards Eerstegeluk

2.6.1 Orders applied for by the appellants (Eerstegeluk)

The appellants applied in the High Court for an order reviewing and setting aside the decision taken by the Minister (a) not to award a section 104 exclusive preferent community prospecting right, and (b) to award such preferent community prospecting rights to a joint venture consisting of the first three respondents.⁴⁵

2.6.2 Appellants' case (Eerstegeluk)

After discussion of the history of the habitation of the BYM community on Eerstegeluk and the occupation by the Roka Phasha Phokwane community of a small strip, and the lodgement of a land restitution claim in accordance with the *Restitution of Land Rights Act* 22 of 1994 (and the subsequent recommendation by the Regional Land Claims Commissioner that the claim satisfied the requirements of section 2 of said MPRDA),⁴⁶ the SCA summarised the case of the tribal council and MUM as follows:⁴⁷

- (a) The [community] was entitled to have a preferent community prospecting right awarded to its corporate vehicle, MUM, on the basis that the [community] was the rightful owner and occupier of Eerstegeluk.
- (b) The Department had ignored the directive by the Constitutional Court to be of assistance.
- (c) The Minister was wrongly taken in by the representations on behalf of the respondents, that they were entitled to the [preferent community] prospecting right.
- (d) "There was an improper relationship between the Minister's Department and the respondents."
- (e) "The Tribal Council and MUM were not afforded an opportunity to deal with the Department's concerns and with the merits of the

⁴⁴ Nooitverwacht appeal para 30.

⁴⁵ Eerstegeluk appeal para 16.

⁴⁶ Eerstegeluk appeal paras 19-21.

⁴⁷ Eerstegeluk appeal para 23.

competing applications and the representations concerning ownership and occupation of Eerstegeluk."

- (f) "In the totality of the circumstances the Tribal Council and MUM were entitled to an order by the court granting MUM the [preferent community] prospecting rights."

2.6.3 Respondents' case (*Eerstegeluk*)

The respondents' case was firstly to question the *locus standi* of the BYM community. Secondly, both the authority and the legal personality of the tribal council were disputed (similar to the challenge made in the Nooitverwacht appeal), and thirdly, MUM's entitlement to a section 104 preferent community prospecting right as well as the BYM community's control over MUM as a commercial vehicle were also disputed.⁴⁸ Fourthly, they argued that the BYM community did not have registered title to Eerstegeluk; however, they did not submit evidence which contradicted the expert opinion on the historical position. Fifthly, the official recognition of the Roka Phasha Phokwane traditional authority on Eerstegeluk, in their view, legitimised the Roka Phasha Phokwane community's claim for a section 104 preferent community prospecting right. Lastly, as regards the restitution claim lodged by the BYM community, they were of the opinion that the "Land Claims Commission will probably look to compensate the [BYMC community] by providing alternative land".⁴⁹

2.6.4 Decision of the High Court (*Eerstegeluk*)

The High Court found that the BYM community had the required *locus standi* and that section 104(2) of the MPRDA authorised a community to utilise a company for pursuing preferent community prospecting rights. As regards the historical connection of the BYM community with Eerstegeluk, the court accepted the expert evidence and found that the Roka Phasha Phokwane community would not succeed to be declared as owners of Eerstegeluk; moreover, it described the BYM community's chances of success as regards their restitution claim to be "almost guaranteed".⁵⁰ According to the High Court, the Department's recommendation and the Minister's decision were based on errors of fact (by having accepted the respondents' misrepresentation and false assertions), and consequently

⁴⁸ Eerstegeluk appeal para 24.

⁴⁹ Eerstegeluk appeal para 25.

⁵⁰ See 2.1.

the award was set aside.⁵¹ However, the court was not willing to grant the appellants the section 104 preferent community prospecting right (in order to enable the Minister and the Department to apply their minds to the appellants' application); moreover, it questioned whether MUM's shareholding agreement would really ensure the accrual of benefits to the BYM community.⁵²

3 Appeal to SCA (Nooitverwacht and Eerstegeluk)

3.1 Parties

As stated above,⁵³ the appellants in both the Nooitverwacht and Eerstegeluk appeals were the BYM community (first), the tribal council (second) and MUM (third). The respondents in the Nooitverwacht appeal were the Minister, the imposters and Genorah. The respondents in the Eerstegeluk appeal were Genorah (first), the Roka Phasha Phokwane Tribal Council (second), the Roka Phasha Phokwane community (third) and the Minister (fourth).

3.2 The case by the appellants (the Tribal Council and MUM) in the Nooitverwacht and Eerstegeluk appeals

As regards the details of the Nooitverwacht appeal, see above.⁵⁴ The SCA summarised the appellants' case as follows:

In essence, what was sought was an order reviewing and setting aside the decision of the Minister to award the Nooitverwacht prospecting rights jointly to the [BYM community] and MUM or to "the [BYM] community" and substituting that decision with a decision to award the sole [preferent community] prospecting rights over Nooitverwacht to MUM.⁵⁵

In respect of the Eerstegeluk appeal, see 2.7.2 above. The appellant's case was summarised by the SCA in the following manner:

...the appellants essentially appeal the decision of the high court not to grant MUM the exclusive preferent community prospecting rights itself.⁵⁶

⁵¹ Eerstegeluk appeal paras 27-28.

⁵² Eerstegeluk appeal paras 29-31.

⁵³ Eerstegeluk appeal paras 29-31.

⁵⁴ See 2.4.2.

⁵⁵ Nooitverwacht appeal para 7.

⁵⁶ Eerstegeluk appeal para 32.

3.3 *The response by the respondents (the Minister, the imposters and Genorah) in Nooitverwacht and the respondents (Genorah, the Roka Phasha Phokwane Tribal Council, the Roka Phasha Phokwane community and the Minister) in Eerstegeluk*

As regards the response of the respondents in the Nooitverwacht appeal, see above.⁵⁷

In respect of the response of the four respondents in the Eerstegeluk appeal, see 2.7.3 above, and as regards the contents of the counter application lodged by the first respondent (Genorah) see 2.6.3 above.⁵⁸

4 Issues before the SCA (Nooitverwacht and Eerstegeluk)

The core issues to be considered by the SCA were:

- (a) Whether it was competent for a company, like MUM, to represent the BYM community in applying for and holding a preferent community prospecting right? Stated differently, can a company be considered as a "community" for the purposes of the MPRDA?⁵⁹
- (b) Whether the tribal council, which was the driving force behind the application by MUM, had a statutory underpinning. Stated differently, "whether the Tribal Council exists in law and, if the answer is in the affirmative, whether it can be considered to be the authoritative voice" of the BYM community.⁶⁰ Related to this was the prior question whether the BYM community had any *locus standi*.⁶¹
- (c) Whether the BYM community exercised sufficient control over MUM to ensure that the prescripts of section 104 of the MPRDA were met. Put differently, whether "the benefits contemplated in affording the preferent [community] prospecting right will result in real and tangible benefits" for the community?⁶²

⁵⁷ See 2.5.3; 2.5.4; Nooitverwacht appeal para 24.

⁵⁸ Eerstegeluk appeal paras 24-25.

⁵⁹ Nooitverwacht appeal para 1.

⁶⁰ Nooitverwacht appeal para 1.

⁶¹ Eerstegeluk appeal para 24.

⁶² Nooitverwacht appeal para 1.

- (d) Whether the minister ought to have granted a preferent community prospecting right to the Roka Phasha Phokwane community to the exclusion of the BYM community and MUM in respect of the farm Eerstegeluk.⁶³
- (e) Whether the fact that the Eerstegeluk farm was not registered in the name of the tribal council or MUM would militate against the grant to them of a preferent community prospecting right.⁶⁴

Issues (a)-(c) were relevant in both the Nooitverwacht and Eerstegeluk appeals, whilst issues (d)-(e) arose specifically in the Eerstegeluk appeal.

5 Decision of the SCA (Nooitverwacht and Eerstegeluk)

5.1 Preliminary findings

At the outset, the SCA made the following findings:

- (a) An application for an exclusive preferent community prospecting right was made by MUM, in which the BYM community is the majority shareholder;⁶⁵
- (b) The application was brought with the full support of the BYM community and its tribal leadership structures;⁶⁶
- (c) The tribal council consulted extensively with the BYM community in respect of the application for a preferent community prospecting right which was submitted to the department on behalf of the BYM community;⁶⁷
- (d) In order to procure a preferent community prospecting right, the impostors and Genorah supplied a number of documents to the Department in which the impression was created that their application was sanctioned by legitimate and representative community structures;⁶⁸

⁶³ Eerstegeluk appeal para 4.

⁶⁴ Eerstegeluk appeal para 5.

⁶⁵ Nooitverwacht appeal para 8.

⁶⁶ Nooitverwacht appeal para 9.

⁶⁷ Nooitverwacht appeal para 10.

⁶⁸ Nooitverwacht appeal para 11.

- (e) The impostors failed to consult sufficiently with the recognised leadership structures within the BYM community. Their alleged consultations were cursory and negligible;⁶⁹
- (f) The impostors knew they had no authority to represent the BYM community or the tribal council;⁷⁰
- (g) Genorah must have been aware of (i) the imposters' absence of authority, and (ii) the unlikelihood that the BYM community or the tribal council would be involved with Genorah;⁷¹
- (h) The Department unquestioningly accepted the application of the impostors and Genorah, and awarded the preferent community prospecting rights to them;⁷² and
- (i) Despite trenchant criticism by the CC of the Department for its unacceptable treatment of the BYM community, the "Department's behaviour continued unabated, to the detriment of the [BYM community] in the present case".⁷³

5.2 Decision regarding the five issues identified above (5.1)

The SCA decided the following in respect of the issues enunciated in 5.1 above:

5.2.1 Competence of MUM

The court cited section 104(1) and (2) of the MPRDA as the background against which MUM's competence to apply for a preferent community prospecting right was to be adjudicated.⁷⁴ The SCA unfortunately referred to the wording of section 104(1) and (2) after it was amended on 7 June 2013 (by means of section 74 of the *Mineral and Petroleum Resources Development Amendment Act 49 of 2008*).⁷⁵ The application for a preferent community right was lodged by MUM upon the date of the decision by the CC (30 November 2010). The dates of the consideration and the granting of the preferent community prospecting rights unfortunately do not appear from the appeals. The SCA found that the

⁶⁹ Nooitverwacht appeal para 21.

⁷⁰ Nooitverwacht appeal para 19.

⁷¹ Nooitverwacht appeal para 19.

⁷² Nooitverwacht appeal para 20.

⁷³ Nooitverwacht appeal para 22.

⁷⁴ Nooitverwacht appeal paras 41-42.

⁷⁵ See 6.1 below for a discussion of the relevant amendments.

tribal council and MUM had demonstrated that the BYM community had overwhelmingly endorsed the application for a preferent community prospecting right, using MUM as the appropriate vehicle.⁷⁶ In effect, the BYM community thus applied for a preferent community prospecting right through MUM.⁷⁷ In other words, the SCA had accepted that it is competent for a company to represent the BYM community in applying for and holding a preferent community prospecting right.⁷⁸

5.2.2 *Legitimacy/standing of BYM community and tribal council*

As regards the *locus standi* of the BYM community, in both the Nooitverwacht appeal⁷⁹ and the Eerstegeluk appeal⁸⁰ it was conceded by the appellants that the BYM community was an amorphous entity that could be discarded for the purposes of the two appeals.

In respect of the legitimacy or standing of the BYM community, the SCA gave an historical overview of the establishment of 774 tribal authorities (subsequently renamed as traditional authorities), each with its own geographical area, for the 774 individual traditional communities concerned in accordance with the *Black Authorities Act* 68 of 1951.⁸¹ The administration of the *Black Authorities Act* 68 of 1951 was assigned by the President in terms of section 235 of the (interim) *Constitution of the Republic of South Africa* 200 of 1993 to the Limpopo Provincial Government, amongst others, by means of Proclamation R109 of 1994.⁸² The *Black Authorities Act* 68 of 1951 had been repealed by the RSA Parliament by means of the *Black Authorities Repeal Act* 13 of 2010.

The SCA subsequently discussed sections 211 and 212 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).⁸³ It also referred to the thereto aligned *Traditional Leadership and Governance Framework Act* 41 of 2003, which provides for the recognition of traditional communities (section 2), the establishment of traditional councils (section 3), and the recognition of traditional leaders (sections 8 and 11).⁸⁴ Reference was also made to the *Limpopo Traditional Leadership and Institutions Act* 6 of 2005, which provides the

⁷⁶ Nooitverwacht appeal para 54.

⁷⁷ Nooitverwacht appeal paras 53-54.

⁷⁸ Eerstegeluk appeal para 61.

⁷⁹ Nooitverwacht appeal para 24.

⁸⁰ Eerstegeluk appeal para 34.

⁸¹ Nooitverwacht appeal para 32; Eerstegeluk appeal para 35.

⁸² Proc R109 in GN 15813 of 17 June 1994.

⁸³ Nooitverwacht appeal para 32; Eerstegeluk appeal para 35.

⁸⁴ Nooitverwacht appeal paras 33-34; Eerstegeluk appeal paras 36-37.

detailed provincial framework for the recognition of traditional communities, the establishment and composition of traditional councils, and the recognition of traditional leaders.⁸⁵ The SCA made short shrift of the respondents' averment that the [BYM] community had never established a traditional council as provided for in the *Limpopo Traditional Leadership and Institutions Act* 6 of 2005 by referring to section 28(4) of the *Traditional Leadership and Governance Framework Act* 41 of 2003, which determines that any tribal authority that existed prior to the commencement of the Act was deemed to be a traditional council established in terms of section 3 thereof.⁸⁶

The SCA found that the tribal council and MUM had demonstrated the *de facto* existence of the tribal council for a century, and in addition had proven that it had existed legally for much of that time.⁸⁷ The SCA accepted that the tribal authority had been formally established on 26 June 1964, and that it had complied with the transformation of its composition (to allow for the democratic election of part of its membership, and including women as members) as provided for in section 28(4), read with section 3(2) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.⁸⁸ It followed that the tribal council "is a constitutional and statutorily established institution", and performs its functions ("principally ... to administer the affairs of the" [BYM] community) as provided for in section 4 of the *Traditional Leadership and Governance Framework Act* 41 of 2003 (and, amongst others, section 10 of the *Limpopo Traditional Leadership and Institutions Act* 6 of 2005).⁸⁹ The SCA also referred to the continued existence of customary institutions within traditional communities (eg the royal council and community meetings), even though they are not officially recognised by statute.⁹⁰

The SCA concluded that, taking into account the statutory basis of the tribal council as well as the extensive community consultation effected by the appellants, it "can hardly think of a more authoritative voice for the [BYM] community than the Tribal Council",⁹¹ and "it is clear that the Tribal

⁸⁵ Nooitverwacht appeal para 34; Eerstegeluk appeal paras 35-37.

⁸⁶ Eerstegeluk appeal paras 38-40.

⁸⁷ Eerstegeluk appeal para 40.

⁸⁸ Eerstegeluk appeal paras 38-41.

⁸⁹ Eerstegeluk appeal para 42; Nooitverwacht appeal para 39.

⁹⁰ Eerstegeluk appeal para 42.

⁹¹ Eerstegeluk appeal para 43.

Council should be considered to be the sole and authoritative voice of the [BYM community]".⁹²

5.2.3 Control by the BYM community

The SCA reiterated the view espoused in the CC in *Bengwenyama* that a commercial entity can be "a legitimate vehicle through which the [BYM] community could exercise the rights afforded in terms of s 104 [of the MPRDA] and be granted preferent [community] prospecting rights".⁹³ A related question was whether the fact that a company has an existence separate from its shareholders precluded MUM from applying for a section 104 preferent community prospecting right.⁹⁴ This view was rejected by the SCA with reference to the CC's decision in *Bengwenyama* in respect of the objects of section 104 of the MPRDA.⁹⁵ The SCA concluded as follows:

[54] I agree that in the real world of high finance – in the present case billions of rand are required for a viable mining enterprise – one can hardly imagine a community such as the [BYM community] being able to engage in mining without the necessary technical and financial assistance that the [Act] requires it to demonstrate. This fact was taken into consideration by the Minister and her Department. In my view the Tribal Council and MUM have demonstrated that the [BYM community] has overwhelmingly endorsed an application for a [preferent community] prospecting right using MUM as a vehicle. That being so, and keeping in mind the context provided by the [CC] as set out in the preceding paragraph, one is led to the compelling conclusion that the application in terms of s 104 by MUM is in substance one by the [BYM community]. The Department was not averse to the use of MUM and at least engaged the Tribal Council concerning the extent of the community's shareholding.

[55] Of necessity, the acquisition by the [community] of the necessary financial and technical assistance requires a certain quid pro quo, in the present case in the form of the shareholding by corporate entities as set out in the shareholders' agreement referred to earlier, with concomitant participation rights.⁹⁶

The SCA subsequently discussed whether the resolution by the tribal council to utilise MUM as such a commercial vehicle satisfied the requirements of section 104(2)(a)-(c) of the MPRDA. The answer to this was partly dependent on the degree of the BYM community's shareholding in MUM.⁹⁷ After analysing the shareholding structure of MUM, the SCA

⁹² Nooitverwacht appeal para 57; Eerstegeluk appeal para 61.

⁹³ Nooitverwacht appeal para 45.

⁹⁴ Nooitverwacht appeal para 52; Eerstegeluk appeal para 55.

⁹⁵ Nooitverwacht appeal para 53; Eerstegeluk appeal para 56.

⁹⁶ Nooitverwacht appeal paras 54-55; also quoted *verbatim* in Eerstegeluk appeal paras 57-58.

⁹⁷ Nooitverwacht appeal para 46; Eerstegeluk appeal para 49.

found that although the BYM community seemed to be the majority shareholder, it did not have the majority control and voting rights.⁹⁸ Although provision was made for a deadlock-breaking mechanisms and mediation, and a veto right was (arguably) vested in the BYM community, the SCA accepted the respondents' submission that the BYM community's shareholding could be diluted as a valid concern.⁹⁹ Counsel for the second and third appellants suggested a substituted order (increasing the BYM community's percentage of shareholding) which, according to the SCA, "safeguards the shareholding of the [BYM community] in MUM"¹⁰⁰ and that "(t)his amended majority shareholding ensures that the prescripts of s 104(2) are met".¹⁰¹

5.2.4 Granting of preferent community prospecting right to the Roka Phasha Phokwane community (Eerstegeluk appeal)

After considering all the uncontested historical evidence submitted on behalf of the appellants relating to the historical rights of the BYM community to Eerstegeluk and the small strip of land on Eerstegeluk occupied by the Roka Phasha Phokwane community,¹⁰² the SCA found in favour of the BYM community. The SCA also took into account that Eerstegeluk would be restituted to the BYM community¹⁰³ and set aside the decision (by the Minister or Departmental official) to award a preferent community prospecting right over Eerstegeluk to the Roka Phasha Phokwane tribal council in a joint venture with the Roka Phasha Phokwane community and Genorah.¹⁰⁴ The SCA replaced the decision of the Minister or Departmental official to award the preferent community prospecting right to Roka Phasha Phokwane tribal council by directing the Minister to issue exclusive preferent community prospecting rights to MUM.¹⁰⁵

5.2.5 Lack of registered title in respect of Eerstegeluk

See 2.3 and 5.2.2 above for a summary of the historical rights of the BYM community in respect of Eerstegeluk, and 2.2 above for an overview of the claim lodged by the BYM community in terms of the *Restitution of Land*

⁹⁸ Nooitverwacht appeal paras 47-48; Eerstegeluk appeal para 50.

⁹⁹ Nooitverwacht appeal paras 50-51; Eerstegeluk appeal paras 51-53.

¹⁰⁰ Nooitverwacht appeal para 51; Eerstegeluk appeal para 54.

¹⁰¹ Nooitverwacht appeal para 56; Eerstegeluk appeal paras 54, 59, 61.

¹⁰² Eerstegeluk appeal paras 4, 15, 16, 20, 28.

¹⁰³ Eerstegeluk appeal para 21.

¹⁰⁴ Eerstegeluk appeal paras 15, 16, 68.

¹⁰⁵ Eerstegeluk appeal para 68.

*Rights Act 22 of 1994.*¹⁰⁶ The SCA emphasised that no competing claim to the restoration of Eerstegeluk had been submitted by either the Roka Phasha Phokwane community or any other community.¹⁰⁷ As regards the question of whether the absence of registered title to Eerstegeluk in the name of the BYM community excluded the tribal council from applying for a section 104 preferent community prospecting right, the SCA found that:

Section 104 of the [Act] contemplates that a [preferent community] prospecting right can be granted to a community in respect of land that either is registered or is *to be* registered in the name of the community.¹⁰⁸

5.3 Department's conduct in respect of both Nooitverwacht and Eerstegeluk

In both the Nooitverwacht appeal¹⁰⁹ and the Eerstegeluk appeal,¹¹⁰ the SCA expressed its extreme displeasure with the "reprehensible conduct" of the Department and the Minister. Firstly, that the dicta of the CC in *Bengwenyama* were ignored by the Department, and in this regard paragraph 3 thereof,¹¹¹ which was quoted in full by the SCA:

[3] The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The [Act] was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land, and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources.¹¹²

The SCA also quoted paragraph 74 of the CC decision in *Bengwenyama* where the following was said in respect of the conduct of the department prior to the CC's decision:

[74] The department was at all times aware that the [BYM] community wished to acquire prospecting rights on its own farms. It gave advice to the [BYM] community over a long period of time in this regard, to the extent of requiring better protection for the [BYM] community in the investment agreement. It continued dealing with the [BYM] community and Bengwenyama Minerals in relation to their application brought on prescribed s 16 forms without informing them of the fact that approval of that application would end their hopes of a preferent [community] prospecting right. There is no explanation from the department for this strange behaviour. The department had an obligation, founded upon s 3 of [the *Promotion of*

¹⁰⁶ Eerstegeluk appeal paras 19, 21.

¹⁰⁷ Eerstegeluk appeal para 21.

¹⁰⁸ Eerstegeluk appeal para 60.

¹⁰⁹ Nooitverwacht appeal paras 58-61.

¹¹⁰ Eerstegeluk appeal paras 62-65.

¹¹¹ Nooitverwacht appeal paras 58-59; Eerstegeluk appeal paras 62-63.

¹¹² Nooitverwacht appeal para 58; Eerstegeluk appeal para 62.

Administrative Justice Act 3 of 2000], to directly inform the community and Bengwenyama Minerals of Genorah's application, and its potentially adverse consequences for their own preferent rights under s 104 of the Act. This obligation entailed, in the circumstances of this case, that the [BYM] community and Bengwenyama Minerals should have been given an opportunity to make an application in terms of s 104 of the Act for a preferent [community] prospecting right, before Genorah's s 16 application was decided. None of this was done.¹¹³

The SCA accepted that there were issues in the *Nooitverwacht* and *Eerstegeluk* appeals that had not been canvassed in the CC decision in *Bengwenyama*; however, the CC's dicta relating to land dispossession and that communities should be assisted could not be discounted and ignored.¹¹⁴ The SCA continued its view relating to the Department's "reprehensible conduct" by giving eight further instances of such conduct.¹¹⁵

- (a) It refused to submit documentation to the High Court;¹¹⁶
- (b) It refused to provide the foundation for its "startling decision" to exclude the three appellants (the BYM community, the tribal council and MUM) on the basis that the BYM community did not own land, although the department had accepted in the prior CC's case in *Bengwenyama* that the BYM community had title to both *Nooitverwacht* and *Eerstegeluk*;¹¹⁷
- (c) It again refused to provide an opportunity to the tribal council and MUM to be heard in respect of 2. above as well as in respect of the competing applications (of the respondents) for section 104 preferent community prospecting rights;¹¹⁸
- (d) It acted in the manner described in 3. above whilst fully aware of the role that Genorah played in the events leading up to the CC decision in *Bengwenyama*;¹¹⁹
- (e) Its decision to award the preferent community prospecting rights "meant that the [CC's] concerns were not headed and that the

¹¹³ *Nooitverwacht* appeal para 59; *Eerstegeluk* appeal para 63.

¹¹⁴ *Nooitverwacht* appeal para 60; *Eerstegeluk* appeal para 64.

¹¹⁵ *Nooitverwacht* appeal para 61; *Eerstegeluk* appeal para 65.

¹¹⁶ *Nooitverwacht* appeal para 61; *Eerstegeluk* appeal para 65.

¹¹⁷ *Nooitverwacht* appeal para 61; *Eerstegeluk* appeal para 65.

¹¹⁸ *Eerstegeluk* appeal para 65.

¹¹⁹ *Nooitverwacht* appeal para 61; *Eerstegeluk* appeal para 65.

relevant issues of community consultation and authorisation were not properly considered";¹²⁰

- (f) The inclusion of Genorah as a party to the joint venture with the BYM community (parties antagonistic towards each other) was described as "capricious" by the SCA;¹²¹
- (g) It did not properly consider section 104(2) of the *MPRDA* as the relevant qualifying provision in the enabling legislation concerned;¹²² and
- (h) Its awarding of a preferent community prospecting right jointly to MUM and Genorah without providing MUM and the tribal council with an opportunity to make representations in that regard was (in terms of administrative law) procedurally unfair.¹²³

5.4 SCA decision not to refer matter back to the Minister and the Department

The SCA stated that where bias or incompetence had been shown in the exercise of a discretion vested in a person or entity, a court may decide not to refer a matter back to the person or entity concerned:

It is however clear in our law that where the original decision-maker has, as in this case, twice exhibited bias or incompetence, the reviewing court can correct that decision itself.¹²⁴

5.5 SCA substituted order

In respect of the Nooitverwacht appeal the SCA made the following order:¹²⁵

- (a) The dismissal of Genorah's conditional cross appeal;
- (b) A declaration that the tribal council "is the only authorised representative of the first applicant [the BYM community] in dealing with the first respondent [the minister]"; and

¹²⁰ Nooitverwacht appeal para 61.

¹²¹ Nooitverwacht appeal para 61.

¹²² Nooitverwacht appeal para 61.

¹²³ Nooitverwacht appeal para 61.

¹²⁴ Nooitverwacht appeal para 64; see also Eerstegeluk appeal para 66.

¹²⁵ Nooitverwacht appeal para 66.

- (c) The preferent community prospecting right issued by the Minister to the first applicant was set aside, and the Minister was directed to issue a full and exclusive preferent community prospecting right to the third appellant [MUM] against proof of the shareholding amendment having been effected.

As regards the Eerstegeluk appeal, the SCA made the following order:¹²⁶

- (a) Dismissal of the cross appeal; and
- (b) The decision of the Minister not to award exclusive preferent community prospecting rights to the applicants was reviewed and set aside, and the Minister was directed to issue "exclusive [preferent community] prospecting rights" to the third appellant (MUM) against proof of the shareholding amendment having been effected.

6 Commentary

6.1 *The distinction between prospecting rights and preferent community prospecting rights*

It is unfortunate that the SCA did not make a clear distinction between prospecting rights and preferent community prospecting rights. The SCA used both terms intermittently throughout the judgement. It is submitted by the authors that the SCA intended to refer to preferent community prospecting rights even when it used the term "prospecting rights".

In *Meepo v Kotze*¹²⁷ it was decided that the grant of a prospecting right to an applicant takes place by contract and that a prospecting right is personal in nature. A prospecting right is granted once the terms and conditions have been determined by the parties upon notarial execution of the deed.¹²⁸ In *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd*¹²⁹ the Supreme Court of Appeal rejected the correctness of the decision in *Meepo* and decided that the granting of a prospecting right takes place by means of an authoritative unilateral administrative act performed by the Deputy Director-General: Mineral

¹²⁶ Eerstegeluk appeal para 68.

¹²⁷ *Meepo v Kotze* 2008 1 SA 104 (NC) 125D.

¹²⁸ *Meepo v Kotze* 2008 1 SA 104 (NC) 125D-F/G.

¹²⁹ *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2015 ZASCA 82 (28 May 2015) paras 22-23, 26.

Development.¹³⁰ Such a grant takes place on the date that the Deputy Director-General approves the Regional Manager's recommendation to grant a prospecting right.¹³¹ It is submitted that upon the subsequent notarial execution of a prospecting right a prospecting right, which still is contractual in nature, is acquired. Upon registration of a prospecting right in the Mineral and Petroleum Titles Registration Office¹³² a statutory limited real right is created.¹³³

With regard to the matter at hand, it is important to distinguish between prospecting rights and preferent community prospecting rights. An application is lodged in terms of section 16 of the MPRDA to acquire a section 17 prospecting right.¹³⁴

A community may apply for a preferent community prospecting right in terms of section 104 in respect of land which is registered or to be registered in its name. The following requirements must be met in terms of section 104(2): the right must be used to contribute towards the development and social upliftment of the community; a development plan indicating the manner in which the right is going to be exercised must be submitted; and the envisaged benefits of the project must accrue to the community. A prospecting right may not yet have been granted over such land. In the event that a party other than the community applies for a prospecting right, the community must be informed by the department of the application and its consequences. The community should be given an opportunity to make representations, and in certain circumstances also to bring an application for a preferent community prospecting right before a decision can be made on the section 16 application for a prospecting right. This duty on the department is based on the *Promotion of Administrative Justice Act* 3 of 2000, read into the MPRDA.

When section 104 commenced in 2004, it empowered the Minister to protect the community's right to apply for a prospecting right for a period of time so that they could get their ducks in a row – if such a right was granted to a community, applications by other applicants could be

¹³⁰ *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2015 ZASCA 82 (28 May 2015) paras 24, 26-27.

¹³¹ *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2015 ZASCA 82 (28 May 2015) para 19.

¹³² Section 5(1)(d) of the *Mining Titles Registration Act* 24 of 2003.

¹³³ Section 5(1) of the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 (hereafter the MPRDA); *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2015 ZASCA 82 (28 May 2015) para 19; see further Badenhorst 2005 *Obiter* 505; Badenhorst and Olivier 2011 *De Jure* 128.

¹³⁴ See Badenhorst and Olivier 2011 *De Jure* 129.

considered only if the community had had the opportunity to arrange for the necessary financial assistance to prospect and mine, and it had become clear that it would not or could not succeed with an application for the granting of a prospecting right. The community was, however, not exempt from having to submit an application for a prospecting right and complying with the requirements of section 17(1) of the MPRDA before it could prospect.¹³⁵

The *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 was assented to on 19 April 2009 and commenced on 7 June 2013 (unless otherwise indicated). The two BYM community cases were put on the 6 August 2012 Northern Gauteng High Court's Opposed Motions Roll.¹³⁶ The Nooitgedacht and Eerstegeluk SCA appeals were heard by the SCA on 22 August 2014 - subsequent to the 7 June 2013 commencement of the MPRDA amendments. The SCA delivered its judgement in both cases on 26 September 2014. As indicated above,¹³⁷ the SCA unfortunately referred to the amended wording of section 104(1) and (2) (which amended wording commenced only on 7 June 2013).

One of the most relevant amendments relates to the definition of "community", which, since 7 June 2013, limits communities to those consisting of historically disadvantaged persons (which may include juristic persons).

The provisions of section 104(1) and (2) have also been amended – the amended section specifically states that an application for a preferent community prospecting right must now be lodged in terms of section 16 (application for prospecting right) or section 22 (application for mining right)). In addition, compliance with the provisions of section 17 (granting and duration of prospecting right) or section 23 (granting and duration of mining right), as the case may be, is required:

17 Granting and duration of prospecting right

- (1) The Minister must within 30 days of receipt of the application from the Regional Manager, grant a prospecting right if-

¹³⁵ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (TPD) (unreported) case number 39808/2007 of 18 November 2008 paras 10, 29. Also see *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC) paras 72-73; Badenhorst and Olivier 2011 *De Jure* 130, 136, 141-142; Badenhorst, Olivier and Williams 2012 *TSAR* 115-116, 119, 120.

¹³⁶ Case number 27136/11 and case number 58867/11 (see North Gauteng High Court 2012 <http://tinyurl.com/gthwylv>).

¹³⁷ See 5.2.1.

- (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
 - (b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;

[sic] the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment;
 - (c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;
 - (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);
 - (e) the applicant is not in contravention of any relevant provision of this Act; and
 - (f) in respect of prescribed minerals the applicant has given effect to the objects referred to in section 2 (d).
- (2) The Minister must, within 30 days of receipt of the application from the Regional Manager, refuse to grant a prospecting right if-
- (a) the application does not meet all the requirements referred to in subsection (1);
 - (b) the granting of such right will result in the concentration of the mineral resources in question under the control of the applicant and their associated companies with the possible limitation of equitable access to mineral resources.
- (3) If the Minister refuses to grant a prospecting right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision with reasons.
- (4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in section 2 (d).
- (4A) If the application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.
- (5) A prospecting right granted in terms of subsection (1) comes into effect on the effective date.
- (6) A prospecting right is subject to this Act, any other relevant law and the terms and conditions stipulated in the right and is valid for the period specified in the right, which period may not exceed five years.

The reference to the requirements relating to technical and financial resources (the unamended section 104(2)(d)), as well as the reference to the provisions of section 23(1)(e) and (h) (the need to provide for the prescribed social and labour plan, and the need to show that the granting of the right will further the objects of the MPRDA - the expansion of opportunities for historically disadvantaged persons to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources) in accordance with the charter and prescribed social and labour plan have been deleted.

Prior to the commencement of the amendments to section 104 of the MPRDA, communities initially applied only for preferent community prospecting rights. When such rights were granted, the communities had time to organise themselves before applying for an ordinary section 16 prospecting right (or a mining right).¹³⁸ It is submitted by the authors that the amendments to section 104 result in only one application having to be submitted by an applicant community, as all the requirements for an ordinary section 16 prospecting right (or mining right, as the case may be) must now also be met when applying for the section 104 preferent community prospecting right.

The protection granted to communities in order to enable them to gather all the resources they need before applying for a prospecting right has in effect been taken away by the commencement of the amendments to section 104.

6.2 "... [L]and which is registered or to be registered in the name of the community concerned": restitution land, redistribution land, and community land acquired from own resources

The SCA referred to the decision of the Regional Land Claims Commissioner that the land would be returned to the BYM community. Section 104(1) determines as follows:

(1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister.

¹³⁸ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (TPD) (unreported) case number 39808/2007 of 18 November 2008 para 10; Badenhorst and Olivier 2011 *De Jure* 136, 141.

The phrase "land which is registered or to be registered in the name of the community concerned" refers to land that has been restored (or is to be restored) to such a community as provided for in the *Restitution of Land Rights Act* 22 of 1994 (read with section 25(7) of the *Constitution*). According to the SCA's decision, this includes land which has been the subject of a successful claim for restoration, although such land has not yet been registered in the name of the successful beneficiary community. Although the lodging of claims for the restoration of land was closed on 31 December 1998 (in terms of the *Restitution of Land Rights Act* 22 of 1994), the process was reopened by the enactment of the *Restitution of Land Rights Amendment Act* 15 of 2014 (for a period of five years, commencing on 1 July 2014). It may be expected that a significant number of new claims for the restoration of land will be lodged by communities. In addition, approximately 2600 claims lodged by 31 December 1990 have not yet been finalised. In many instances such claims are complex community claims.¹³⁹

The question arises whether land which is currently registered in the deeds office in the name of the State (or a State entity) as the trustee (or custodian) for a specific community qualifies to be the subject of a section 104 application for a preferent community prospecting or mining right. Taking into account the objectives and provisions of the *Communal Land Bill*, 2015, which on implementation will result in the removal of all references to the State as trustee and the registration in full ownership of all communal land in the name of the community concerned, it is suggested that, based on the transformational approach evident in the MPRDA, all communal land currently registered in the name of the State (or a State entity) as trustee should qualify as section 104(1) land.

A further question is whether land acquired (with State assistance) by a community in terms of the Redistribution Programme (as provided for in section 25(5) of the *Constitution* and the *Provision of Land and Assistance Act* 106 of 1993) also qualifies in terms of section 104(1) of the MPRDA. It is proposed that the answer to this should be in the affirmative, as section 104(1) does not specifically limit "land" to land acquired or to be acquired in terms of the Restitution Programme. A third question is whether land acquired by a community entirely from its own resources (without any State support) also qualifies for the purposes of section 104(1) of the MPRDA. In this case it is proposed that the answer should also be in the

¹³⁹ See Commission on Restitution of Land Rights 2015 <http://tinyurl.com/gu3n8md>; PMG 2015 <http://tinyurl.com/zoms3mu>.

affirmative, as section 104(1) of the MPRDA refers to "land which is registered or to be registered".

A related matter, which urgently requires policy formulation and a regulatory framework, is what is the effect of existing prospecting activities or mining operations on a beneficiary community to whom land is restored (in terms of the Restitution Programme), acquired with state assistance (in terms of the Redistribution Programme), or acquired entirely from private resources (without any State assistance).

6.3 Community decision-making and consultation – the changing landscape

The SCA indicated that the BYM tribal authority was the authoritative voice of the BYM community when it said that the court could "hardly think of a more authoritative voice for the [BYM] community than the Tribal Council",¹⁴⁰ and "it is clear that the Tribal Council should be considered to be the sole and authoritative voice of the [BYM community]".¹⁴¹ In these two appeals the SCA dealt with land occupied by a community which had an officially recognised traditional council (established and recognised in accordance with the provisions of the *Traditional Leadership and Governance Framework Act* 41 of 2003 and the *Limpopo Traditional Leadership and Institutions Act* 6 of 2005). However, in the vast majority of successful claims for the restoration of land, a communal property institution is established in accordance with the provisions of the *Communal Property Associations Act* 28 of 1996 (and in most instances, a Communal Property Association registered with the Department of Rural Development and Land Reform), or in a limited number of cases, a Trust (registered in terms of applicable legislation with the Master's Office in the Department of Justice and Constitutional Development). Recently the *Communal Property Associations Amendment Bill*, 2015 was published for public comment. It aims to strengthen the regulatory and administrative control by the Department of Rural Development and Land Reform, and provides for the re-registration of land reform land currently registered in the name of a Communal Property Association in the name of the community concerned (or another name, as identified by the community). The *Communal Property Associations Amendment Bill*, 2015 must be read with the provisions of the *Communal Land Bill*, 2015 (which, as indicated above, provides for the registration of all communal land currently

¹⁴⁰ Eerstegeluk appeal para 43.

¹⁴¹ Nooitverwacht appeal para 57; Eerstegeluk appeal para 61.

registered in the name of the State or State entity as trustee for the community concerned, in the name of such community). According to the *Communal Land Bill*, 2015, every community must establish a Households Forum which, by a majority decision of 60 per cent, must decide on the identity of the entity which will be responsible for the allocation and management of land rights. Such a land management institution may be either an entity established in terms of the *Communal Property Associations Act* 28 of 1996 or a traditional council established and recognised in accordance with the *Traditional Leadership and Governance Framework Act* 41 of 2003 and applicable provincial legislation. The question arises which community entity will, subsequent to the commencement of the *Communal Land Act* (which is yet to be enacted), be the legitimate community entity for the purposes of being the "authoritative voice" of the community as regards (a) the submission of a section 104 application for a preferent community prospecting or mining right, and/or (b) compulsory consultation by the Department in the event that a third party submits an application for a prospecting or mining right.

7 Conclusion

In casu, the Department had no regard at all for either the preferent statutory rights of the BYM community or the provisions and the objectives of the MPRDA, but rather granted preferent prospecting rights to applicants who acted fraudulently and clearly without the support of the BYM traditional community. The bias and incompetent conduct of the Department was exposed by the Constitutional Court in the first round of litigation and then again by the Supreme Court of Appeal in the second round of litigation.¹⁴² The custodian of the people of South Africa failed dismally to protect the interests of the BYM community, whilst the conduct of members of the Department was contrary to the *Constitution*, the provisions and objectives of the MPRDA, and the basic principles of justice and equity. This raises the question as to whether the custodian (and some members of the Department) is fit to fulfil the role of a trustee of the mineral resources of the people. As the private law remedy of the removal of an errant trustee is not available, recourse to the courts is probably the only option to have decisions by the Department (and the custodian) reviewed and set aside. With dwindling foreign and local investments in the mineral industry and lay-offs of workers due to poor economic conditions, full compliance with the constitutional framework and the objectives and the provisions of the MPRDA by the Department (and

¹⁴² Nooitverwacht appeal para 64.

the custodian) in the consideration of applications for preferent community prospecting and mining rights and the award of such rights is urgently required. Moreover, this should, at a minimum, be accompanied by ensuring substantive community participation and full adherence to the constitutional values of administrative justice, transparency and accountability.

It is interesting to note that there is a correlation between the names of the two farms (Eerstegeluk means "first luck", and Nooitverwacht means "never expected") and the eventual outcomes of the two rounds of litigation. The BYM community had some **luck** during the **first** round of litigation as its application was not lodged as a section 104 application at the time.¹⁴³ However, the Constitutional Court found that the BYM community's application was in fact a section 104 application for a preferent community prospecting right. Armed with a decision and sound directives by the Constitutional Court, the BYM community probably **never expected** that the custodian and its department would treat its application, as supported by the community and the Constitutional Court, with utmost contempt and act so dishonestly. Given the legal battles the BYM community had to fight to legally acquire the preferent community prospecting rights it deserved, the community has probably experienced the setting aside and substitution of the decisions of the department by the Supreme Court of Appeal, together with an award of preferent community prospecting rights over the two farms, as **a miracle upon a miracle**.

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¹⁴³ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (TPD) (unreported) case number 39808/2007 of 18 November 2008 para 11.

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List of Abbreviations

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|-----|------------------------|
| BYM | Bengwenyama-Ya-Maswazi |
| CC | Constitutional Court |

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| MPRDA | Mineral and Petroleum Resources Development Act 28 of 2002 |
| MUM | Miracle Upon Miracle Investments (Pty) Ltd |
| PELJ | Potchefstroom Electronic Law Journal |
| PMG | Parliamentary Monitoring Group |
| SCA | Supreme Court of Appeal |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg |